

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP413-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2015CF317

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MANUEL ROLON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. A jury convicted Manuel Rolon of second-degree recklessly endangering safety and substantial battery (bodily harm intended).

Rolon appeals from the judgment of conviction and from a circuit court order denying his postconviction motion alleging ineffective assistance of trial counsel.

¶2 The case against Rolon arose out of a violent confrontation with a church property manager. Rolon, who had been living on church property allegedly without permission, repeatedly hit the victim with a metal shovel, severely injuring him. The confrontation occurred after the victim notified Rolon that the church owner (David Davenport) had directed that the locks be changed, and Rolon should not be on the premises. The jury convicted Rolon in the attack on the victim.

¶3 Postconviction, Rolon alleged two ineffective assistance of trial counsel claims. The circuit court held an evidentiary hearing on the first claim and denied Rolon's request for a new trial because the court determined that counsel was not ineffective when counsel withdrew a request to adjourn the trial. Without holding an evidentiary hearing, the circuit court denied the second claim that Rolon's trial counsel was ineffective for not objecting to references to him as a "squatter" on the church property.

¶4 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. *Id.* We will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review de novo whether counsel's performance was deficient or prejudicial. *Id.*

Adjournment claim

¶5 Trial was scheduled for April 26, 2016. On April 22, Rolon's daughter and grandson were killed in an out-of-state accident. On April 25, Rolon's counsel requested an adjournment because Rolon was grieving and making funeral arrangements. On April 26, the scheduled trial day, the court addressed the motion to adjourn. The following exchange occurred among the court, defense counsel and Rolon:

The Court: I did meet with counsel in my office briefly to discuss some procedural issues. There had been a motion to adjourn which Mr. Ulrich [defense counsel] filed yesterday. And my understanding is, Mr. Ulrich, you're withdrawing that motion at this time?

Mr. Ulrich: That is correct, Your Honor. I've had a chance to speak with Mr. Rolon. He is in a better emotional mental state this morning and we're all here. He would like to withdraw his motion and proceed with trial this morning.

The Court: That is correct, sir, that you wish to withdraw your motion to adjourn?

The Defendant: Yes, sir.

The Court: And do you wish to have the trial today?

The Defendant: Yes, sir.

The Court: Okay. Then we will permit the withdrawal of that motion to adjourn and will proceed today.

¶6 Postconviction, Rolon argued that his trial counsel was ineffective for withdrawing the motion to adjourn because counsel had reason to believe that Rolon's bereavement rendered him not competent for trial. Rolon alleged that trial counsel told him to be ready to proceed on the scheduled trial date, and Rolon believed that his motion to adjourn had been denied.

¶7 At the postconviction motion hearing, trial counsel testified that as a result of deaths in Rolon's family, trial counsel filed a motion to adjourn, but counsel still advised Rolon to appear for trial the next day. Rolon was upset, but he was able to interact with counsel. On the morning of trial, counsel and Rolon met, and counsel noted that Rolon seemed in a little better shape and seemed ready to go to trial. Trial counsel testified that Rolon wanted to have a trial, was not able to make arrangements to travel to join his family until later in the week, and he wanted to put the case behind him. In a colloquy with the circuit court, Rolon agreed to withdraw the motion to adjourn.

¶8 Rolon testified postconviction that his counsel decided to withdraw the adjournment motion. Rolon thought the motion had already been denied because his counsel told him the morning of trial that they had to proceed. Due to his condition, he was not able to assist in his defense during trial.¹

¶9 After hearing testimony from trial counsel and Rolon, the circuit court made the following findings relating to the adjournment. The circuit court found that trial counsel counseled Rolon the day before trial and the morning of trial, and it was Rolon's decision to withdraw the motion to adjourn. The court concluded that trial counsel did not perform deficiently.

¶10 The circuit court's findings are not clearly erroneous based on the record. See *Jeannie M.P.*, 286 Wis. 2d 721, ¶6. Credibility determinations were for the circuit court. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844. The circuit court clearly found that trial counsel was more

¹ Rolon testified at trial.

credible than Rolon. Counsel’s testimony supports the court’s findings about counsel’s conduct and his interactions with Rolon regarding the adjournment. The record supports a determination that Rolon agreed to proceed to trial. Counsel was not ineffective in relation to the adjournment.

Failure to object to “squatter” description

¶11 A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted). We may independently review the record to determine whether it provides a basis for the circuit court’s exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶12 In his postconviction motion, Rolon argued that his trial counsel should have objected to the description of him as a squatter because the testimony was inadmissible character evidence showing a propensity to violate the law. *See* WIS. STAT. § 904.04(1) (2015-16).²

¶13 In rejecting this claim without a hearing, the circuit court noted that the jury heard a variety of evidence about the nature of Rolon’s presence on the

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

church property, what had been done to have him removed, and the circumstances surrounding Rolon's attack on the victim. The court viewed the squatter references as the witnesses' lay description of Rolon's presence at the church. The court did not deem counsel deficient for failing to object to the squatter references.

¶14 We decide this issue based on the prejudice prong of the ineffective assistance claim. To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." *State v. Reed*, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted).

¶15 We agree with the circuit court that Rolon's ineffective assistance claim did not warrant an evidentiary hearing. The jury heard conflicting testimony about the basis for Rolon's presence on the property. Two witnesses testified that Rolon was a squatter. Rolon also testified in lay terms about his basis for being on the church property: he had purchased the property, and he was in an ownership dispute with Davenport, the party who directed that the locks be changed. We conclude that even if trial counsel should have objected to the squatter testimony, it is not reasonably probable that the trial outcome would have been different had counsel objected. *See id.*

¶16 Because the record demonstrated that Rolon was not entitled to relief on this ineffective assistance claim, the circuit court properly exercised its discretion when it denied the claim without an evidentiary hearing. *See Allen*, 274 Wis. 2d 568, ¶12.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

